Communiqué

January, 1999
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PRESIDENT'S REPORT



A Progress Report on Bencher Matters

In the last Communiqué I reported to you on certain issues that would be on future Bencher agendas. Here is a progress report on some of those issues.

Title Insurance

We met with the Honourable Michael Radcliffe, Q.C., Minister of Consumer and Corporate Affairs in December to brief him on title insurance. We

advised the Minister that, among other things, a few modest improvements in Land Titles procedures would assist lawyers in competing with title insurers and we asked for the Minister's support. We also suggested to the Minister that his department review and consider what regulations should be put in place to deal with title insurers since, at this time, they are unregulated. In the meantime, we are continuing to work in a co-operative way with representatives from the Land Titles Offices. Our goal is to achieve a registration system that will allow for almost immediate release of monies on closing without risk to the parties.

Incorporation of Professionals

We have prepared draft amendments to *The Law Society Act* that will allow lawyers to incorporate. These amendments to the Act, if passed, will allow lawyers many of the tax advantages afforded other business people, while at the same time ensuring that we, as a self-governing profession, continue to protect the public in the same fashion as we have in the past. We had a preliminary meeting with the Honourable Victor Toews, Q.C., Minister of Justice, along with several of his officials, to review the key issues relating to the incorporation of lawyers. After review by Legislative Counsel, we expect the draft amendments to our legislation to be presented at the next sitting of the Legislature.

Mentorship

You may have noticed from the January *Headnotes & Footnotes* that Jennifer Cooper, Q.C., President of the Bar Association, has enthusiastically supported an improved mentorship program as a joint initiative of the Manitoba Bar Association and the Law Society. The development of this program is underway. The goal is to establish a program where lawyers (usually those more recently called to the Bar, but not excluding more senior lawyers) will have access to more experienced lawyers for advice on legal issues and practice matters. Look for further announcements in the near future.

Multi-Disciplinary Practices

Reports have now been prepared by the Canadian Bar Association and The Law Society of Upper Canada on multi-disciplinary practices. In the context of lawyers' activities, these are practices in which lawyers and non-lawyers practice together in partnership. These types of practices are currently prohibited by the Code of Professional Conduct in Manitoba. This issue will be dealt with at upcoming meetings of the Federation of Law Societies. The Benchers had a preliminary review of this issue at the December Benchers' meeting. It was the consensus of the Benchers that we should endeavour to adapt our rules in such a way as to ensure that the public is adequately protected (on critical issues such as the protection of privilege) but at the same time provide sufficient flexibility so that lawyers can compete in the marketplace with other professionals. The issues will require careful study.

Libraries

The Manitoba Law Library Inc. was incorporated as of November 9, 1998. This is a non-profit corporation, the sole member of which will be The Law Society of Manitoba. As at April 1, 1999, this corporation will take over management of the Great Library and the Rural Libraries. Allan Fineblit has been spending a tremendous amount of time preparing for the takeover, reviewing and establishing budgets, and generally considering all of the challenges that we face in providing adequate library services to our members at reasonable costs.

Budgeting

The budget for next year will be presented at the February Benchers' meeting. The Law Society faces many challenges. We must continue to be an effective self-governing body and that costs money. We have additional cost pressures to deal with, such as assuming full responsibility for the libraries. The Benchers are very aware that it is expensive to practise law these days, so we have imposed controls to keep costs in line but still meet our obligations. We don't expect any bad news in this budget

Where were you in ... 1982?

Allan Fineblit, Q.C.

Chief Executive Officer

This is the second article in this series, motivated entirely by the discovery of a pile of old Annual Reports. In September we told you about the law-biz in 1960. This month we ask the musical question, where were you in 1982?

The 1982 Annual Report covers the period from April 1, 1981 to March 31, 1982. Keith Turner was the President of the Law Society and Knox Foster was the Vice-President. Graeme Garson was the CEO. There were 1,282 lawyers practising in Manitoba (there are 1,700 today). The Law School had just begun reducing enrolment but its full impact hadn't yet hit. There was a large (89 people) and distinguished group called to the Bar in June of 1981, including: dynamic defence duo, Bruce Bonney and Saul Simmonds; Investors Group President of Corporate Compliance Dave Cheop; MBA President Jennifer Cooper; Provincial Court Judge Cathy Everett; Queen's Bench Justices Sylvia Guertin and John Menzies; computer maven Tom Hadaller; two rookie Crown Attornies David Gray and James Parrott and one seasoned one, Don Slough; Crocus Fund counsel Celia Kaufman (now Gorlick); Joanna Knowlton (part of the Brandon Mafia running the Public Trustee's office); domestic violence guru Dorothy Pedlar; Herb Peters (while I would never describe Ceci as Barry's wife, I can't resist describing Herb as Vic's brother); vicious street-hockey player and Montague Israels prize-winner Jim Ripley; Minnedosa miracle Norm Sims (or is it Neepawa nugget?); law professor Alvin Esau; and from this year's Q.C. list, Theresa Wakeham (now McDonald).

Libraries were still operated by the Law Society in 1982 and the Annual Report noted: "escalating library costs have severely tested the ability of the Society to maintain adequate libraries throughout the province...one of the essential problems to be addressed is to determine a method of adequate financing for a proper library system without giving up the appropriate control or input that the lawyers in Manitoba should maintain."

Chrys Pappas chaired the Judicial Committee (now the Discipline Committee). One member was disbarred in 1982. The Admissions and Education Committee was chaired by John Guy. They spent a fair bit of time musing about the impact of the decreased enrolment at the Faculty of Law. David Frayer chaired the Insurance Committee. 1982 was the year when a Rule change was introduced to require all lawyers to subscribe to the Society's Professional Liability Insurance coverage.

The Legal Aid Liaison Committee, chaired by Myrna Bowman, recommended an hourly rate of $56.

Graeme Haig chaired a Joint Public Relations Committee of the Law Society and the MBA. Many of the activities of that Committee (*Headnotes and Footnotes*, Law Day) continue to be ably operated by the MBA.

Acting for Both Sides: Is it Worth the Risk?

Kate Craton
Claims Investigator

Solicitors' conflicts of interest - acting for both sides in a transaction - cause professional negligence claims. True or False? While it's a commonly held belief that "representing both parties" is a significant cause of insurance claims against lawyers, research indicates that only about 3% of claims concern matters where the *cause* of the claim was the solicitor representing both parties to the transaction.

Yet in an astonishing proportion of professional negligence claims against solicitors, one finds that the impugned lawyer *was* representing more than one party to the transaction, although the claim may bear no direct or obvious relation to any possible conflict of interest. The experience of the Manitoba Professional Liability Claims Fund suggests that a disgruntled client is much more inclined to pursue a negligence claim against his or her solicitor where the lawyer was acting for more than one party to the transaction. The conflict seems to cast an aura of impropriety over the entire transaction, tainting all the solicitor's actions and advice. The onus is then on the lawyer to prove that the advice and services rendered to the client were every bit as good as those the client could have received from independent counsel.

In many cases, the cause of the professional negligence claim appears to be the solicitor's failure to anticipate the emergence of a latent conflict, and to then take timely and effective action. Solicitors seem to have a

compulsion "to close": in their zeal to resolve problems and to push the transaction through to completion, solicitors can be insensitive to the distinctions between the fundamental interests of the individual clients. When differences emerge, solicitors tend to slip into the role of mediator, struggling to negotiate compromise between the parties, when the appropriate response is to identify the inherent conflict problem, signal it to the clients, and refer each to independent counsel. Failure to deal promptly with a conflict often leads to the worsening of an already difficult situation.

The rationale for the proscription against lawyers' conflicts of interest is discussed in Chapter 5 of the Code of Professional Conduct, with its Commentaries and Notes. Those pages contain a full analysis of what constitutes a conflict of interest and the lawyer's obligations in situations where a conflict exists; if you haven't read the chapter recently, you should. Fundamental to the lawyer/client relationship are two concepts: loyalty and confidentiality. The duty of loyalty means that the lawyer must provide uncompromised advice; the lawyer must exercise his or her professional judgment solely for the benefit of the client, free from compromising interests and unfettered by commitments to others. The duty of confidentiality requires that all communications be kept private so that the client is free to disclose all relevant information and thus obtain the best possible legal advice. A conflicting interest is one that threatens those essential elements.

Obviously, where you represent two clients who are involved in the same transaction, there is a high probability that you will have divided loyalties, will be incapable of preserving the confidential nature of the relationship, and will therefore have a conflict of interest. It is extremely unlikely that the immediate interests of both clients and their needs for protection from future contingencies will be identical. Accordingly, when advising one client, your judgment cannot be free from compromising influences or conflicting loyalties, and in putting at the disposal of one client all of your knowledge, you are likely to reveal the confidences of the other.

Having said all that, there is no absolute rule that you must never act for two parties to a transaction in which their interests conflict. You may act for both sides in a non-contentious matter, until a dispute emerges, subject to certain limitations. Commentary 5 of Chapter 5 of the Code details the qualifications you must meet to be able to act for multiple parties. These are the basics:

1. Before accepting the joint retainer, you must advise each client that:

   (a) you have a pre-existing solicitor/client relationship with one party, if that is the case;

   (b) you have been asked to act for each of them;

   (c) nothing they tell you and no material information you discover about their position, interests or obligations can be withheld from the other party/client. (Be very specific here: this includes any piece of damaging information which could emerge down the line and which you would have been able to keep in confidence and protect under solicitor/client privilege, had you only been acting for the one); and

   (d) if an unresolvable dispute develops, you cannot continue to act for both, and may have to withdraw completely.

2. Make sure that both clients understand what you have told them, and the implications of that advice. Stress that you will not be able to act as either's advocate, in the traditional adversarial sense. Ask them to consider, now, whether there is anything about their interest in the transaction which they would want or expect you to conceal from the other party, and attempt to flesh out any latent conflict or dispute which may ultimately emerge. Ask them, expressly, whether they consent to your proceeding with the joint representation, in light of what you have discussed. You should also come to some understanding as to what legal fees would be payable, and by whom, in the event that either or both clients ultimately have to be referred out.

3. Ask yourself: is it likely that a contentious issue between these parties will arise or that their interests, rights or obligations will diverge as this matter progresses? Certain circumstances should set off sirens of potential conflict. For instance, be wary of situations where:

(i) one client wants to or should proceed more slowly than the other;
(ii) significant terms remain to be negotiated between the parties;
(iii) the transaction appears to be unwise for one of the parties;
(iv) there is great disparity in bargaining power between the parties, or one owes the other a fiduciary duty;
(v) one client might have grounds to avoid the transaction (e.g. for misrepresentation or undue influence); or
(vi) you have information which you or one of the clients think should not be passed on to the other client.

In any such case, and regardless of the fact that all parties consent to - or are pleading for - the multiple representation, the Code says *'guard against acting for more than one'*.

4. Once all parties have consented, and assuming that you decide to proceed with the joint retainer, make a written record of their agreement, in the form of their written consent or by your confirming letter.

If you are going to undertake the multiple representation, the following are suggestions for reducing the risks of a professional liability claim down the line:

A. Send each client the confirming letter described in the Commentary. Take half an hour now to prepare a precedent letter to clients, for use in these kinds of cases. The letter could very simply describe the nature of the transaction, identify the parties for whom you have been asked to act, and confirm the elements of your advice as described in paragraph 1 above. The pertinent components of Chapter 5, Commentaries 5 & 6 of the Code could be paraphrased, to ensure that the clients are aware of the terms on which you will undertake or terminate the joint retainer. The clients' agreement regarding payment of your fees could also be confirmed. With your copy of this letter on file, there should be no accusation later that the clients were not fully advised about the multiple representation.

B. Open a separate file for each client and, to the fullest extent possible, conduct each file as if you were dealing with an independent solicitor on the other side. Use a checklist to ensure that you are not overlooking any of the protections to which each is customarily entitled. If the matter involves a transaction of purchase and sale, insist that the parties set a closing date, and treat time as being of the essence. On closing, transfer the purchase monies from the purchaser's file to the vendor's - and don't forget Rule 129 (1)(j) which requires you to obtain the client's written authorization for the transfer of trust money from that client's account to the other's.

C. Keep both clients fully advised about all aspects of the transaction. Remember that each is entitled to know everything contained in the other's "file", not just the kinds of information he or she would have accessed had the parties each had separate counsel. One way to ensure that material information is not withheld is to have both clients attend the same meeting at your office to review and execute documents. There can then be no suggestion of failure to communicate important details to either client.

D. Do it by the book. This is not the file on which you should rely on your clients' implied authority to make decisions about "usual" matters or to impose compromise where issues arise (since "this is the way that issue is always settled and, anyway, I know what's best for the clients"). Make sure that you have your clients' clear instructions every step of the way.

There may well be cases where the clients' interests are best served by having a single lawyer represent both sides. Commentary 4 of Chapter 5 of the Code lists several of the factors clients may weigh in deciding whether to consent to the lawyer's multiple representation (the availability of another lawyer of comparable expertise, the extra cost, delay and inconvenience involved in engaging another lawyer, among others). But, more often than not, lawyers end up acting for both sides simply because they don't know how to say "No" and have a deep-rooted aversion to turning away work of any kind.

Risks accompany the benefits of acting on both sides. If proper attention is given to all aspects of the transaction from the perspective of each client, the economies of having a single solicitor may disappear. If a

dispute arises, the lawyer will probably have to refer both clients out of the office, in which case neither will be inclined to pay the lawyer's bill. Most importantly, if any aspect of the transaction turns out badly for either client, the underlying conflict of interest may be contorted into a cause of action against the lawyer, regardless of whether there was any actual breach of duty on the lawyer's part. Remember, too, that when a lawyer acts in a situation of conflict (whether advertently or otherwise), the onus is on the lawyer in any ensuing lawsuit to prove that the client received the best professional assistance which could have been afforded had the client been engaged in the transaction with an independent lawyer. Be sure you are prepared to submit your conduct and advice to that kind of scrutiny before you undertake the joint retainer.

Barnyard Animals Abused

Allan Fineblit, Q.C.
Chief Executive Officer

It's entirely true. Some idiot (initials A.F.) thought it would be helpful to lighten up the heavy-duty January 14th Bencher meeting Agenda by having a contest. Benchers were challenged to incorporate barnyard references into their discussions.

Well, of course, chickens came home to roost and several carts were put before their horses. To their credit, no one was called a horse's behind and I only heard "bullshirt" once (without the "r"). Here are some of the highlights of the meeting.

- President **Doug Finkbeiner** reported on a meeting of representatives of the joint Law Society/MBA committee on title insurance held with the Minister of Consumer and Corporate Affairs, Michael Radcliffe. Doug reported that the Minister was very receptive to the recommendations of the Committee. Dauphin Bencher **Al Semchuk** noted how helpful it was having an experienced lawyer as Minister of Consumer and Corporate Affairs, "like having a fox in the hen house".

- Benchers approved executive limitations which have the effect of delegating a considerable number of housekeeping functions from the Admissions and Education Committee to Law Society staff, including the approval of principals, admission as an articling student, abridgement of articles, eligibility for call, transfer to the Manitoba Bar and a resumption of active practice. Non-routine applications still require Admissions and Education Committee approval. Mixed metaphors used in the discussion included: cows coming home to roost (**Lewis Wasel**) and a complicated Clydesdale metaphor (from Icelandic horse owner **Campbell Wright**).

- Benchers approved draft amendments to *The Law Society Act* to permit lawyers to incorporate. We can only recommend *Act* amendments which must be passed by the Legislature (the government has indicated a willingness to consider this kind of legislation). As Law Society Vice-President **Barney Christianson** so eloquently put it, "when you're not the lead horses on the team, the view is unchanging and uninteresting".

- Benchers considered a Monitoring Report on the discipline process and directed the preparation of rules to make the process more timely and cost-effective. Lay Bencher **Claudia Wright** noted that some people have as much regard for rules "as a barn cat for a marriage license".

- Benchers defeated motions to change the budget process and use Law Foundation revenue for the Reimbursement Fund. **Bill Johnston** didn't want to close the barn door after the horse was in the pasture.

It will come as no surprise that **Sid Green** won the prize when he quoted a politician of his acquaintance who "took the bull by the tail and looked it straight in the eyes".

NOTICE OF BENCHERS' MEETING

Notice is hereby given that a meeting of the Benchers of the Law Society of Manitoba will be held on

Thursday, **February 25, 1999 at 12:30 p.m.** in the Society's Boardroom, 219 Kennedy Street, Winnipeg, Manitoba. Members of the Society are encouraged to attend and participate in the deliberations of the governing body.

Section 14 of *The Limitation of Actions Act* – An Update

We draw your attention to the Court of Appeal's recent decision in *Rarie* v. *Maxwell* delivered on December 21, 1997 on appeal from (1997), 124 Man. R. (2d) 241. Philp, J.A. considered whether the statutory discoverability scheme found in Part II of *The Limitation of Actions Act*, R.S.M. 1987, c.L150 renders the application of the judge-made discoverability rule laid down by the Supreme Court of Canada in *Kamloops (City of)* v. *Nielsen et al.*, [1984] 2 SCR 2, unnecessary in Manitoba. He concluded that our Legislature had enacted a comprehensive and exclusive code in Part II of *The Limitation of Actions Act* and that judge-made discoverability rules do not apply in Manitoba.

Some lawyers have been proceeding on the basis that the full limitation period begins to run anew from the date of discovery. The *Rarie* decision clarifies that a Section 14 application must be brought not more than 12 months after the discovery of "material facts of a decisive character upon which the action is based."

We urge you to review this recent decision and also to attend the upcoming Continuing Legal Education Program of The Law Society of Manitoba titled "Limitation of Actions – Law at Lunch," March 23, 1999 from 12:00 - 1:30 p.m.

This program promises informed and thoughtful discussion of the recent cases in this difficult area. Some of the issues to be addressed include the discoverability rule in Manitoba, evidence required on extension applications, and consideration of what constitute "material facts". Presenters will be Mr. Justice Twaddle, Manitoba Court of Appeal (who wrote the concurring judgment in *Rarie* v. *Maxwell*), and Bill Gange of Suche Gange. Cost to register is $35.00 ($30.00 for students) plus G.S.T. and includes lunch and materials. Materials can be purchased separately for $20.00 plus G.S.T., and video rental and audio sales are also available. For more information, contact the Continuing Legal Education Department of The Law Society of Manitoba at 942-5571 or visit the Law Society of Manitoba Website at **www.lawsociety.mb.ca**.

Legal Studies - *Learning for Success*

Brenda Silver
Assistant Director of Professional Education

> *"Obstacles not withstanding, informed commentators and professionals agree that the road to learning is the road to success."*

The above quote from an article in the Canadian Bar Association's *National* magazine ("The Learning Lawyer: CLE in the new millennium" by Simon Chester, November 1998) echoes the sentiments of the Legal Studies Department. We are committed to providing a range of learning opportunities that are relevant, accessible and affordable to our members, students and support staff. We want to help you succeed. We want to journey with you on that road to success.

Learning Opportunities

For many the main path of learning is the standard continuing legal education program. We offer a broad range of CLE programs. They feature knowledgeable and articulate presenters. But, learning opportunities are more than "live" programs. There are other roads to explore in your quest for success. When you think about educational opportunities, think about these other routes:

- Bar Admission Course materials (available by the chapter or complete binder)
- CLE written course materials
- CLE material subscriptions
- Video tapes of CLE programs

- Audio tapes of CLE programs

Relevant

Success has many signposts - professional competence, client satisfaction, personal actualization and financial wellbeing. Our CLE courses and the materials developed for them focus on keeping lawyers up-to-date on developments in the law and practice, loss prevention and ethical issues, and practice and self-management. We also recognize that successful lawyers need competent employees, so programming has been extended to include support staff.

We emphasize issues relevant to Manitoba's legal community. Your colleagues know the lay of the land and can point you in the right direction to success. When appropriate we invite speakers from outside Manitoba to share their knowledge and expertise with our members.

Lawyers at different stages of their professional journey may need different types of education. We offer programs to meet the special needs of the junior and senior lawyers, as well as the majority in the middle of their careers.

Accessible

Lawyers are busy meeting their professional, business and personal obligations. We recognize this. We strive to make learning opportunities available in a variety of formats, at different locations and at different times of the day. However, if you can't attend a program:

- rent the videotape
- order the audiotape
- buy the materials
- request a session in-house or at an alternative location.

Although the routes may differ, the destination of success is the same.

Affordable

Our registration fees and material prices are some of the lowest in the country. We also offer a range of discounts:

- reduced registration fees for students and support staff
- "newly called" lawyer discount certificates
- distance bursaries
- multiple registration packages
- volume discounts on publication orders
- CLE material subscription rates
- reduced prices on older BAC and CLE materials

We can't offer you a free ride to success, but we can make your journey affordable.

One final quote from Simon Chester's article:

> ***"Continuing legal education is not a luxury. It is a necessity."***

Soap Opera Lives

What Do You Really Know About Your Clients?

Tana Christianson
Director of Insurance

Times and social mores have changed and so have the relationships our clients may have with one another (to say nothing of their relationship with us – but that's a whole separate article). You can no longer assume that the elderly couple who arrive at your office to do some estate planning are legally married – to each other, that the children are in fact children of the marriage, and that there are no prenuptial agreements or arrangements with previous spouses that impact on wills and estate planning, devolution of estates and transfer of property.

Recent files of the Professional Liability Claims Fund contain the following examples of situations where lawyers have been caught in the complexity of clients' personal relationships (editorial license has been taken to preserve confidentiality):

> The fact that an elderly couple (who the lawyer's family had known for years) had actually never been legally married, didn't come to the attention of the lawyer until well into the administration of the "wife's" intestate estate.
>
> A lawyer acted on the sale of property by a client who he had known socially for several years. The lawyer believed that the client was not married. The client signed the Declaration saying he was unmarried. The client's wife objected to the sale of the property.
>
> A lawyer, acting on the sale of what had been the marital home, was advised by the vendor that he was "no longer married". He may have been no longer married in his own eyes, but neither he nor his estranged wife had ever done anything about a divorce.
>
> An administrator of his mother's estate, when asked by the lawyer about his family, said he had sisters but no brothers. This was not quite accurate. There was a brother, but the administrator had disowned his brother years before and no longer acknowledged his existence.

Fortunately, in all of these situations, no indemnities were actually paid , although claims were reported and costs were incurred by the Claims Fund in defending the claims and sorting out the confusion. Though difficult to quantify, there were also costs to the lawyers who were the subject of the claims, both in terms of billable hours lost and personal anxiety.

How can you avoid future claims and anxiety? It is possible to ask questions about clients' relationships without being impolite. Ask, "when were you married?" or "when were you divorced?" and write the answer in your file notes. Asking to see a Marriage Certificate or a copy of the Divorce Judgment may also be prudent. These simple steps can give you both the information and protection you need.

Even if you think you know a client, the information you have may not be accurate or current. You are not just being nosey. How various legislation operates depends on the legal status of the relevant relationships and can impact drastically on what the client wants to achieve.

Were the lawyers in the four scenarios negligent? We think not, but fortunately, as all the potential damage arising in these situations was able to be "undone," we were not obliged to test our view in the Courts.

Ask questions. The answers may surprise you.

COPYRIGHT NOTICE TO MEMBERS OF THE LEGAL PROFESSION

From The National Copyright Committee Of The Federation Of Law Societies Of Canada December 1998

Member societies will be aware that CanCopy has recently printed advertisements indicating the availability of license agreements for law firms to address photocopying of legal materials.

In earlier notices, the National Copyright Committee emphasized the important public policy and legal questions concerning copyright in legal materials. Some of these questions are the subject of a trial which began in the Federal Court on November 23, 1998 between the legal publishers and The Law Society of Upper Canada. We hope that the decision in that case will provide guidance to law societies, libraries and members of the profession in understanding the scope of copyright in legal materials, the applicability of various exemptions in the Copyright Act, and what copying activities, if any, should be covered by a license from CanCopy. In our view, it would be preferable for CanCopy to await the outcome of the trial before finalizing an agreement and approaching the legal profession. However, we understand that CanCopy does not wish to wait until the case is decided since it believes that the decision will likely deal with narrow issues that will not impact on law firms.

Our specific comments concerning the agreement in the form currently proposed by CanCopy are as follows:

- We understand that the royalty rates set out in the Agreement were decided by CanCopy based on information obtained from licensing schemes in other contexts and other countries, notably the U.K. The Committee recognizes the difficulty in establishing an appropriate royalty rate without engaging in a comprehensive survey of the Canadian legal profession. At the same time, we note that an empirical basis for the royalty rates proposed by CanCopy has not been established in the Canadian legal context. For this reason, we believe it would be preferable to await the outcome of the current litigation such that there will be a clearer understanding of what copying activities should be properly covered by the license, and thereby to assess the value of such copying.

- While we are pleased that the license agreement provides for no increases in the royalties to be paid to CanCopy for two (2) years, we note that there are no limits on increases in royalty rates after that time, nor is there a clear basis for determining how adjustments would be made in subsequent years (e.g., to take into account any decline in copying of legal materials).

- The license agreement acknowledges that it has no application to copying that is permitted under the *Copyright Act;* however, the Agreement provides little guidance to indicate when copying of any legal materials may be permitted (e.g., because they are not subject to the publishers' copyright, because copyright has expired or because copying may be covered by an exemption in the *Copyright Act).* Again, it would be the Committee's preference to await the outcome of the litigation so that members of the profession might have a better understanding of their rights in this area.

- To the extent that the legal publishers already acknowledge that the copying of materials such as reported judicial decisions for use in judicial and other proceedings is not compensable, we understand that the license agreement will not apply to this activity.

- Law firms should be aware that the license agreement does not permit the conversion of works from printed form into electronic media (except for the making of a temporary digital copy solely to make a single print copy). The agreement also does not permit the copying of any work from CD-ROM or other digital media into printed form.

- Members of the profession should note the prohibitions against any "off-premises" copying (except for materials owned by the firm) and the obligations to insert a notice on the first page of any copy that is made under the agreement.

- The agreement limits the amount of copying that may be made under the agreement, and when a firm requires copies beyond such limits, it will be necessary to obtain specific permission from the rights holders.

- Any law firm should also review carefully the provisions of the license agreement relating to record-keeping and the rights of inspection granted to CanCopy. Under the form of agreement currently proposed, a firm is not required to provide any information or make available its records in such a way as to violate any obligation of confidentiality to clients or solicitor-client privilege.

A law firm that is requested to sign a license agreement with CanCopy is encouraged to seek its own advice in responding to such request. Law firms should be apprised specifically of certain provisions of the *Copyright*

Amendment Act passed in 1997 which have not as yet been proclaimed, but are expected to come into force shortly. These include provisions that permit a party in an infringement proceeding to claim statutory damages without the need to provide the actual damages suffered due to the infringement.

Other provisions of the *Copyright Amendment Act* will permit a library that is not established for profit or that does not form part of a body conducted for profit to provide a single copy of certain works or excerpts to any person requesting the same for purposes of research or private study.

Member societies would need to consider carefully whether these provisions apply to libraries falling within their purview.

Safe Counsel

Members of the profession are reminded that since December, 1995, a number of volunteer lawyers have been available to act as "safe counsel" to individuals concerned that they have been or are being subjected to harassment and/or discrimination within the legal profession as well as to individuals against whom allegations of harassment or discrimination have been made. The role of safe counsel is to act as a resource person and, if necessary, as a support person for these individuals. Safe counsel does not act as legal advisor or advocate in the traditional sense of the word but rather provides information with respect to procedures and the potential consequences of the various options available for dealing with harassment and discrimination.

The services of safe counsel are free of charge and are available to both lawyers and non-lawyers, including clients and legal support staff. Communications with safe counsel are treated as confidential.

Membership Changes

The following members have voluntarily changed their status as indicated on the dates shown:

Practising to Non-Practising

January 1, 1999 Alexander C. Phillips

Non-Practising to Practising

December 14, 1998 Renald J. Guay
January 4, 1999 Renee D. Szewczyk
January 4, 1999 Miranda K. Harder
January 4, 1999 Bernard Toews
January 4, 1999 Kathryn J. Durkin

Practising to Inactive

November 2, 1998 Lori A. Kroeker
November 25, 1998 Glenn D. Joyal
December 1, 1998 John J. Keely
January 1, 1999 Nadine S. Silverman
January 8, 1999 Shelly L. McFadyen

Inactive to Practising

December 14, 1998 Veronica L. Jackson

IN MEMORIAM

The Right Honourable Brian Dickson – Retired Chief Justice of Canada Died on October 17, 1998 at the age of 82. The Honourable Brian Dickson was called to the Bar in 1940. He was the President of The Law Society of Manitoba from 1962 to 1963 and appointed Justice, Court of Queens Bench in October, 1963. He was Appointed to the Manitoba Court of Appeal in June, 1967, and appointed to the Supreme Court of Canada in March, 1973 and then appointed Chief Justice of Supreme Court in April, 1984. The Honourable Brian Dickson retired in June, 1990 and was named companion to the Order of Canada in December, 1990.

Francis Bastin Lamont Died on November 13, 1998 at the age of 65. Mr. Lamont was called to the Bar in June, 1960. He articled with the firm of Thorvaldson, Eggertson, Bastin and Stringer from 1960 to 1963, when he joined James Richardson & Sons (later Richardson Securities of Canada). There, his career spanned over 25 years, starting as their one-man legal department, later rising to spend eight years as Chief Executive Officer. After Richardsons, Mr. Lamont worked as CEO of the Saskatchewan Investment Corporation in Regina from 1988 to 1990, launching that corporation with great success. Mr. Lamont returned to Winnipeg, where he was active in specialized consulting in law and economics, largely in securities and finance.

Gerald Potasky Died on November 25, 1998. Mr. Potasky was called to the Bar in 1965 and worked for the Industrial Development Bank in Toronto.

The Honourable Mike Baryluk Died on December 8, 1998 at the age of 83. Judge Baryluk graduated from Law School with Honours and was called to the Bar in 1949. He practiced law until 1968 when he was appointed to the Provincial Court as a Judge. He received an appointment as a citizenship Court Judge in 1977 and in 1983 retired from the Provincial Court to be appointed to the Federal Tax Court as a Deputy Judge, where he had the opportunity to travel Canada from coast to coast until the age of 75. He continued the practice of law from 1983 to 1996.

Donald Cameron McGavin, Q.C. passed away on December 24, 1998 at the age of 84. Mr. McGavin was called to the Bar in 1940. Mr. McGavin practised law with the Aikins firm in Winnipeg from 1945 until 1967. In 1957, he was appointed Queen's Counsel. He participated actively in the transition of United College to become the University of Winnipeg. In 1968, Mr. McGavin joined INCO Limited, in its Toronto office in a legal capacity, and later became its Corporate Secretary. Mr. McGavin was active in the formation, in 1959, of F.P. Publication Limited in which the separate newspaper interest of four proprietors were merged to include nine daily newspapers. Later as a Trustee of the John Sifton Estate he became a Director of F.P. Publications Limited and also of the Globe and Mail. In 1980, he was active in the sale of the former to the Thompson Group.

Did you know...about contingency agreements?

That a lawyer who neglects to provide his client with a copy of a contingency contract risks much more than the loss of the fees to which he might otherwise have been entitled? *Section 58(2)* of *The Law Society Act* requires a lawyer who enters into a contingency contract with his or her client to deliver to the client a copy of the contingency contract together with a copy of *Sections 58 (4) (5)* and *(6)* of *The Law Society Act*. A lawyer who fails to do so is not entitled to any remuneration beyond what he would have been entitled to had no such contingency contract been made. There may, however, be other consequences beyond the lawyer's ability to recover fees from his client. In a recent decision the Discipline Committee found a member to be guilty of professional misconduct for having failed to comply with his **mandatory obligation** under *Section 58(2)* of *The Law Society Act* to provide his client with a copy of the contract and the relevant sections of *The Law Society Act*.

Members are also reminded that the termination of a contingency agreement should be addressed in the written contingency contract. Practice Direction 90 – 04 provides that a lawyer who represents a client on a contingency basis "does not have any discretion as to whether he or she will pursue that litigation to trial or settlement, and the lawyer cannot withdraw from representation unless the written contingency agreement specifically states that counsel has a right to do so and the circumstances under which this may occur."

It isn't good enough to advise your client of the basis upon which you will be charging for your fees or will be entitled to withdraw your services. Commit it to writing. Provide a copy to your client together with *Sections*

58 (4) (5) and *(6)* of *The Law Society Act*. Protect your own interests as well as those of your client.

NOTICE TO THE PROFESSION

Re: Lawyers' Fee Assessments under Rule 71

A subcommittee of the Statutory Rules Committee has been established to look at the issue of lawyers' fee assessments under the current Rule 71. The committee is composed of Senior Master Goldberg, Allan Fineblit, Mona Brown and Justice Deborah J. McCawley as chair.

The committee will be looking at whether lawyers' fee assessments should continue to be available through courts and, if so, how that process might be improved upon.

To that end, the committee would be most interested in hearing from members of the legal profession as to their experience with fee assessments before the Masters and any concerns or suggestions they might have for improvement which would assist the committee in its work.

Please provide your comments in writing to:

Madam Justice Deborah J. McCawley
Law Courts Complex
226 – 408 York Avenue
Winnipeg, Manitoba
R3C 0P9

Articling Information Session / Career Day

An information reception for firms and students will be held on Wednesday, February 10, 1999, from 4:00 - 6:00 p.m. at the University of Manitoba, Faculty of Law, Robson Hall. All firms and government agencies are invited to participate. The reception is free of charge to those firms who will be participating in the mass articling interviewing weekend to be held on Saturday and Sunday, June 5 and 6, 1999. The cost for non-participating firms is $50.00

Comprehensive Co-Mediation And Mediation

Internship Pilot Project

The Comprehensive Co-Mediation and Mediation Internship Pilot Project has been initiated as of January 4, 1999. It is anticipated that service delivery will commence in early April.

Project goals are:

- The provision of comprehensive mediation services to a sample population of parents undergoing separation/divorce.

- The provision of a mediation practicum opportunity for professionals with the appropriate academic and mediation training credentials.

This is a 15 month pilot project funded under the Federal Child Suppport Guidelines Implementation Fund, and administered by Manitoba Justice. Three staff have been hired to develop and implement the program: Senior Mediator, Legal (Fay-Lynn Katz); Senior Mediator, Family Relations (Andrew Zurawsky); and Mediator, Family Relations (yet to be named).

The project will be located at 901 – 213 Notre Dame Avenue, Winnipeg, MB, R3B 1N3.

Further information concerning this pilot project can be obtained by calling Andrew Zurawsky at 945-5110 or Fay-Lynn Katz at 945-4021 or Fax: 948-2818.

Tax on Income

The Province's Minister of Finance, Eric Stefanson, is interested in your comments on a proposal to have the Province levy income taxes directly rather than as a percentage of federal income tax. Discussion papers on the issue are available at the Province's website (www.gov.mb.ca/finance). We have copies of the paper. If you would like a copy, contact Pat Bourbonnais at 942-5571.

TWELVE LAWYERS NAMED QUEEN'S COUNSEL

Congratulations are extended to the following lawyers appointed Queen's Counsel on December 31, 1998:

Lisa M. Collins, partner in the firm Thompson, Dorfman, Sweatman
Peter J. Falk, Vice-President of Business Development/Corporate Secretary/General Counsel of Manitoba Telecom Services Inc.
Duncan D. Jessiman, partner in the firm Aikins MacAulay & Thorvaldson
Theresa L. McDonald, supervising attorney for Legal Aid Manitoba (Thompson)
Lawrence R. McInnes, crown attorney for Justice Manitoba – Public Prosecutions
Brent Mills, President of Assiniboine Community College
Robert H. Morrison, crown attorney for Justice Manitoba – Public Prosecutions
Hon. David G. Newman, Minister of Energy and Mines and Northern Affairs
E. Wells Peever, partner in the firm Aikins MacAulay & Thorvaldson
Roland E. Rivalin, partner in the firm Tupper & Adams
K. Eleanor Wiebe, partner in the firm of Fillmore Riley

and our own.....

Allan Fineblit, Chief Executive Officer of the Law Society of Manitoba.

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